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IN THE

Supreme Court of the United States

October Term, 1951.

No. 686.

[illegible] Development Corporation, Lord Corporation, and L. D. Lord, *Petitioners*,

v.

[illegible] Luis Dscoutte, Jesus J. Jimenez, Vicente Gaston Polanco, Mariano Villaronga, Ramon Colon Torres, Fernando Sierra Berdecia and Juan A. Pons, as members of the Executive Council of Puerto Rico, and Vicente Gaston Polanco, as Attorney General of Puerto Rico, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

REPLY BRIEF OF PETITIONERS TO BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 558.

EVERLASTING DEVELOPMENT CORPORATION, LONG CORPORATION, and L. D. LONG, *Petitioners,*

v.

SOL LUIS DESCARTES, JORGE J. JIMENEZ, VICENTE GEIGEL POLANCO, MARIANO VILLARONGA, RAMON COLON TORRES, FERNANDO SIERRA BERDECIA and JUAN A. PONS, as members of the Executive Council of Puerto Rico, and VICENTE GEIGEL POLANCO, as Attorney General of Puerto Rico, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

REPLY BRIEF OF PETITIONERS TO BRIEF IN OPPOSITION.

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1. Respondents are strangely silent in their brief in opposition concerning one of the most serious aspects of the decision below which makes a review by this Court so important. Although the court of appeals recognized that the dismissal in the district court was based on the prohibition of the Butler Act (Record 33), without adverting to that question again the court below proceeded to weigh the allegations of the complaint and, holding them to be insufficient,

affirmed the dismissal on that ground (Record 34, 41-42). So far as we have been able to determine, this is the only case in which a federal court of appeals has followed such a procedure. Both the Fourth Circuit and the Fifth Circuit, in cases in which a declaratory judgment action had been dismissed for lack of jurisdiction, expressly declined to extend the scope of review beyond the precise jurisdictional question raised by the district court's decision. *Purcell* v. *Summers,* 126 F. 2d 390, 395-396 (C. C. A. 4, 1942), certiorari denied, 317 U. S. 640; *Mississippi Power & Light Co.* v. *City of Jackson,* 116 F. 2d 924, 926 (C. C. A. 5, 1941), certiorari denied, 312 U. S. 698. The decision of the court below thus brings it clearly into conflict with the Fourth and Fifth Circuits.

Moreover, to permit an affirmance by a Court of Appeals in such circumstances as these to rest on the insufficiency of the complaint renders nugatory the provisions of Rule 15 of the Federal Rules of Civil Procedure relating to amendment of pleadings. Rule 15 must contemplate that all issues relating to the sufficiency of the pleadings shall be canvassed initially in the district court, where the opportunity to amend is readily available if a pleading is found deficient in any respect.[1] The action of the court below certainly

[1] It is no palliation of this unusual procedure on the part of the court of appeals that petitioners might have filed a motion in that court for leave to amend their complaint under 28 U. S. C. § 1653, which provides: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Such leave to amend would not have improved petitioners' circumstances, for even after the complaint had been amended to meet the criticisms of the court of appeals petitioners would still have been barred by the decision of the district court that it had no jurisdiction because of the provisions of the Butler Act. Nor would it be an answer to say that petitioners might by this means have compelled the court below to decide the issue as to the effect of the Butler Act. Even assuming that this result could have been achieved in this way, we have never conceived it to be the obligation of any litigant to resort to indirect means to compel any court—and certainly not a federal court of appeals—to perform its plain duty.

represents a departure from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

2. Respondents' argument concerning the insufficiency of the factual allegations of the complaint to make out a case for federal jurisdiction (Br. in Opp. 7-9) serves to point up the manner in which the court below has misapplied the principles laid down by this Court. In *Snowden* v. *Hughes*, 321 U. S. 1, this Court said that the complaint failed to state a claim of denial of equal protection of the laws because of the lack of any allegations "tending to show a purposeful discrimination between persons or classes of persons * * *" (321 U. S. at 10). On the other hand the court below said (Record 41):

> * * * There must be a purposeful discrimination against one person and in favor of another person in like case, with no rational basis for a differentiation between the two. The complaint in the case at bar, however, carefully refrains from alleging that tax exemption has been granted to other persons in like case with the plaintiffs, engaged in the mass production of low-cost housing.

In other words, the court below has said in effect that even though the insular officials did not act in complete good faith in acting on petitioners' application, no inequality in the constitutional sense is involved because petitioners are the only persons in their class and therefore no one in their class is receiving more favorable treatment. Thus the court below has narrowed the principle laid down by this Court, with the result that "purposeful discrimination between * * * classes of persons" is not recognized as an unequal application of the law. A review of this case is imperative in order that this Court may reaffirm that equal protection of the laws requires a good-faith administration of the law as to each class subject thereto just as much as

it requires equal treatment of each member of any given class.

3. Respondents tend to distort the essential nature of this case by stressing the first prayer for relief (Br. in Opp. 7, 12-13) at the expense of other portions of the complaint. At the same time respondents ignore petitioners' concession in the court below that they could not expect the full relief sought—a judicial declaration that they are entitled to tax exemption—and their claim that they were entitled to ask the district court for a declaratory judgment so limited in scope as merely to preclude the Executive Council from denying their application upon an erroneous conclusion of law (Record 40).[2]

In this way they justify their contention (Br. in Opp. 7) that petitioners' whole case is based on the non-federal question of the construction of an insular statute. Yet even the court below recognized that the complaint was drawn on the theory that there had been an intentional discrimination in the administration of the statute, although it held the allegations of such intentional discrimination to be insufficient (Record 41-42). As to the sufficiency of those allegations to show a purposeful discrimination, we rest upon the record (Record 6-9) and our petition (Pet. 9-11). Of course, once jurisdiction is established on the basis of the claim of denial of a constitutional right, the district court may then pass on the whole case and determine whether or not as a matter of law petitioners are ineligible to receive the benefits of the Industrial Tax Exemption Act. *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629.

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[2] On this view the provision in the statute that the Governor approve the tax exemption did not require that the Governor be made a defendant in this action, as respondents suggest (Br. in Opp. 12). Until the Executive Council had acted favorably, the Governor was not called upon to act (Record 37). Now that the Industrial Tax Exemption Act has been amended to vest in the Governor the functions formerly performed by the Council, the nullification of the illegal action of the Council would leave petitioners with their application still pending, to be acted upon by the Governor under the amended statute.

4. The fact that after this complaint was dismissed by the district court a suit was filed by one of the petitioners in the Tax Court of Puerto Rico does not prove the existence of "a plain, speedy and efficient" local remedy, as respondents seem to think (Br. in Opp. 10, 11, note 7). Cf. *Georgia Railroad & Banking Company* v. *Redwine*, No. 1, October Term 1951, opinion rendered January 28, 1952, 20 LW 4108, at 4109. Moreover, this Tax Court proceeding was brought primarily to raise other issues, and it does not include the same period as does the present action.

Although respondents suggest that local procedures are available by which petitioners may litigate in the insular Tax Court the constitutionality and effect of Section 16 of the Industrial Tax Exemption Act,[3] they do not explain why the prohibition against judicial review in Section 16 does not stand on the same footing as the state statute involved in *Mountain States Co.* v. *Public Service Commission*, 299 U. S. 167, in which this Court said that the "essential remedy in the state courts does not emerge from the probability that the statute expressly prohibiting it may hereafter be declared ineffective" (299 U. S. at 170). Nor do they comment on the effect of Section 2 of Act No. 328, Laws P.R., approved May 13, 1949, which vests in the Tax Court of Puerto Rico exclusive jurisdiction of all cases in connection with the payment of all kinds of taxes, with the proviso that "the Executive Council of Puerto Rico shall, until otherwise provided by law, continue to retain its authority and jurisdiction to take cognizance of all proceedings for the temporary tax exemption of new industries."

Even if this Court should, as in *Georgia Railroad & Banking Co.* v. *Redwine*, 339 U. S. 901, order a continuance in this cause for a sufficient period to enable petitioners

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[3] Section 16 provided: "All resolutions and findings of the Executive Council and of the Governor of Puerto Rico under the provisions of this Act, shall be final, and no judicial or administrative proceeding shall lie against the same." (Record 37).

to prosecute the proceeding in the insular Tax Court to a conclusion to determine whether it is in fact a plain, speedy and efficient remedy, there is no showing that a decision in that case would apply retroactively so as to affect petitioners' claim here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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